

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

NO. 77-6175

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NORMAN BIRNBAUM, ET AL.,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

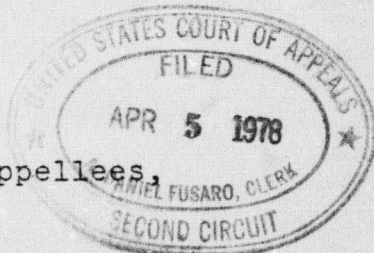
REPLY BRIEF OF THE UNITED STATES
COMBINED WITH THE BRIEF OF THE
UNITED STATES AS CROSS-APPELLEE

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I N D E X

	<u>Page</u>
Reply to Plaintiffs' Arguments on the Appeal of the United States -----	1
1. The discretionary function exception applies -----	1
2. The postal matter exception applies -----	7
3. New York law provides no cause of action -----	8
A. Cause of action for illegal search and seizure -----	8
B. Trespass to chattels -----	12
4. The District Court awarded excessive damages -----	13
Response to Plaintiff's Cross-Appeal -----	17
Conclusion -----	23
Certificate of Service -----	24
Addendum -----	25

C I T A T I O N S

Cases:

Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) -----	8
Bonn v. Puerto Rico Inter- national Airlines, Inc., 518 F.2d 89 (C.A. 1, 1975) -----	23
Brenon v. State, 31 A.D.2d 776 (case 2), 297 N.Y.S.2d 88 (4th Dept. 1969) -----	11
Cargill, Inc. v. Commodity Credit Corp., 275 F.2d 745 (C.A. 2, 1960) -----	22-23
Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) -----	2

Cases Continued:

City of Boston v. Ditson, 348 N.E.2d 116 (App. Ct. Mass. 1976) -----	8
Cunliffe v. County of Monroe, 63 Misc. 2d 62, 312 N.Y.S.2d 879 (Monroe Cy. 1970) -----	9
Dalehite v. United States, 346 U.S. 15 (1953) -----	4, 5, 6
Downs v. United States, 522 F.2d 990 (C.A. 6, 1975) -----	4
Feather v. Queen, 6 B. & S. 257, 122 Eng. Rep. 1191 (Q.B. 1865) -----	22
Gabaldon v. United Farm Workers Organizing Committee, 35 Cal. App. 3d 757, 111 Cal. Rptr. 203 (1974), cert. denied, 416 U.S. 957 -----	8
Galloway v. United States, 319 U.S. 372 (1943) -----	19-20
Glasspool v. United States, 190 F. Supp. 804 (D. Del. 1961) -----	17
Glidden Co. v. Zdanok, 370 U.S. 530 (1962) -----	20, 22
Government Employees Ins. Co. v. United States, 349 F.2d 83 (C.A. 10, 1965), cert. denied 382 U.S. 1026 (1966) -----	23
Hardy v. United States, D.D.C. No. 76-1423, decided Feb. 14, 1977, 1977 -----	5
Hatahley v. United States, 351 U.S. 173 (1956) -----	3
Hook v. State, 15 Misc. 2d 672, 181 N.Y.S.2d 621 (Ct. Cl. 1958) -----	11
Larez v. Oberti, 23 Cal. App. 3d 217, 100 Cal. Rptr. 57 (1972) -----	8

Cases Continued:

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) -----	2
McElrath v. United States, 102 U.S. 426 (1880) -----	17-18
Murphy v. CIA, N.D. Iowa, No. C 76-12, decided May 28, 1976 -----	5
Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1252 (C.A. 2, 1975) -----	3
Nader v. General Motors Corp., 57 Misc. 2d 301, 292 N.Y.S.2d 514 (Sup. Ct. 1968), affd. 31 A.D.2d 392, 298 N.Y.S.2d 137 (1st Dept. 1969), affd. 25 N.Y.2d 560, 307 N.Y.S.2d 647, 255 N.E.2d 765 (1970) -----	9
Oestereich v. Selective Service System, 393 U.S. 233 (1968) -----	2
O'Connor v. United States, 269 F.2d 578 (C.A. 2, 1959) -----	23
Piphus v. Carey, 545 F.2d 30 (C.A. 7, 1976), reversed, 46 U.S.L.W. 4224 (U.S., March 21, 1978) -----	14, 15, 16
Siebel v. United States, N.D. Calif., No. C-76-1737 SC, decided December 17, 1976 -----	5-6
Trippe v. Port of New York Authority, 17 A.D.2d 472, 236 N.Y.S.2d 312 (2d Dept. 1962), rev'd. 14 N.Y.2d 119, 249 N.Y.S.2d 409, 198 N.E.2d 585 (1964) -----	9

Page

Cases Continued:

United States v. Ehrlichman, 546 F.2d 910 (C.A.D.C. 1976), cert. denied, 418 U.S. 683 (1977) -----	2
United States v. Neustadt, 366 U.S. 696 (1961) -----	23
United States v. Nixon, 418 U.S. 683 (1974) -----	2
United States v. Sherwood, 312 U.S. 584 (1941) -----	18-19
United States v. United States District Court, 407 U.S. 297 (1972) -----	2
Wintringham v. Lafoy, 7 Cow. 735 (1837) -----	12

Statutes:

5 U.S.C. § 706(2)(A) -----	2
15 U.S.C. § 714b(c) -----	22
28 U.S.C. § 2674 -----	16
28 U.S.C. § 2680(a) -----	2

Miscellaneous:

2 Jayson, Handling Federal Tort Claims § 305.01 -----	17
41 N.Y. Jur., <u>Negligence</u> § 41 (1965) -----	10
Prosser, <u>Torts</u> § 14 -----	12
Prosser, <u>Torts</u> § 36 (4th ed. 1971) -----	10
Restatement (Second) of Torts -----	12, 13

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REPLY TO PLAINTIFFS' ARGUMENTS ON THE APPEAL
OF THE UNITED STATES

1. The discretionary function exception applies.

Plaintiffs unfairly mischaracterize the government's argument as follows:

The essence of the government's principal defense in this case is that officials of the United States may violate precise constitutional and statutory prohibitions in order to serve the interests of "national security."

A.Br. 6. 1/ See also B.Br. 22. On the contrary, the government expressly disavows such an argument, and maintains instead that this is the very kind of issue that should not be decided in a Federal Tort Claims Act suit. See our main brief at 19-21 & n. 8. Plaintiffs rely extensively on non-tort cases involving mandamus relief, 2/ criminal law, 3/ criminal discovery, 4/ judicial review of agency action, 5/ and suits

1/ References in this brief to "plaintiff(s)" should be read as limited to the plaintiff or plaintiffs who submitted the brief subsequently cited. "A.Br." refers to the brief of plaintiffs Avery and MacMillen. "B.Br." refers to the brief of plaintiff Birnbaum.

2/ Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), relied upon by plaintiffs at A.Br. 14-15. See our main brief at 25-26.

3/ United States v. Ehrlichman, 546 F.2d 910 (C.A.D.C., 1976), cert. denied, 418 U.S. 683 (1977), relied upon at A.Br. 17.

4/ United States v. Nixon, 418 U.S. 683 (1974), relied upon at A.Br. 15-16, involved the enforceability of a subpoena in a criminal case. United States v. United States District Court, 407 U.S. 297 (1972), relied upon at A.Br. 16-17, involved whether information should be supplied to a criminal defendant because wrongfully obtained. Plaintiffs nonetheless assert that the United States v. United States District Court case is "conceptually similar to the one at bar."

5/ Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971); Oestereich v. Selective Service System, 393 U.S. 233 (1968), relied upon at A.Br. 17-18. Plaintiffs' assertion that the discretionary function exception to the Tort Claims Act should be interpreted the same way as the "committed to agency discretion by law" exception to the APA is frivolous. The APA in another provision expressly contemplates review for abuse of discretion, 5 U.S.C. §706(2)(A), while the FTCA specifically states that the discretionary function exception will apply even if discretion is abused. 28 U.S.C. §2680(a). It obviously follows that the FTCA exception is much broader than the APA exception. Plaintiffs' argument in this regard demonstrates the danger of holding that findings of illegality will preclude application of the discretionary function exception: many suits normally brought for judicial review under the APA will be brought under the Tort Claims Act. See our main brief at 26-27. Plaintiffs simply do not respond to this concern.

against officials in their individual capacity. ^{6/} These cases in no way affect the government's position that when decisions involving discretion are made at a policy-making level, they are not reviewable under the Tort Claims Act for abuse of discretion or for illegality, even if illegal action is asserted. The Tort Claims Act was simply not intended by Congress to provide an additional cause of action in which such issues could be raised. Nothing in the government's argument suggests that federal officials may act illegally. ^{7/}

Like the district court, plaintiffs rely on Hatahley v. United States, 351 U.S. 173 (1956), and Myers & Myers, Inc. v. United States Postal Service, 527 F.2d 1252 (C.A. 2, 1975). A.Br. 8-9, 10-12, 13, n. 6; B.Br. 22. As we demonstrated in our main brief (at 21-27), those cases did not involve decisions made at a policy-making level. They were instead violations at the operational level of regulations promulgated at

^{6/} See A.Br. 20-21.

^{7/} Plaintiffs disavow a "purpose" to "challenge the constitutionality and legality of the mail opening program," asserting that "all that the plaintiffs seek in this case, as in any case under the FTCA, is damages" for tort liability under New York law. A.Br. 9, n. 5. Whatever plaintiffs' subjective purpose, the asserted unconstitutionality and illegality of the mail opening program is the foundation of their arguments both below and in this Court. Obviously the remedy sought in any FTCA suit is money damages for tort liability under state law; the legislative history nonetheless clearly indicates that FTCA suits are not to serve as vehicles for resolving certain constitutional and legal issues. See our main brief at 20, 26, n. 11.

the policy-making level. ^{8/} Plaintiffs make no attempt whatever to refute this analysis.

Plaintiffs also fail to come to grips with Dalehite v. United States, 346 U.S. 15 (1953), which of course dealt with lawful activity. See A.Br. 7-8. As explained in our main brief, at 17-20, Dalehite cannot be distinguished on that ground. Dalehite states that for Tort Claims Act purposes

^{8/} Downs v. United States, 522 F.2d 990 (C.A. 6, 1975), relied upon by plaintiffs (A.Br. 13), supports this analysis. The Sixth Circuit found the discretionary function exception did not apply to actions of an FBI agent in the airplane hijacking situation of that case, not because of illegal or unconstitutional action, but because

In this case, the FBI agents were not involved in formulating governmental policy. Rather, the chief agent was engaged in directing the actions of other government agents in the handling of a particular situation. FBI hijacking policy was not being set as an ad hoc or exemplary matter since it had been formulated before this hijacking. Hijacking policy had previously been promulgated in the FBI Handbook and in a memorandum jointly issued by the Departments of Transportation and Justice. While the government's guidelines for dealing with hijacking are secret and must remain so, we note that Special Agent O'Connor was not making policy in responding to this particular situation.

522 F.2d at 997. The Court found that the agent "violated FBI policy and disregarded the substance of [FBI] Guidelines." 522 F.2d at 1002. In contrast, the actions of federal officials in the instant case were taken as a result of decisions made at policy-making levels.

"[w]here there is room for policy judgment and decision there is discretion." 346 U.S. at 36. Plaintiffs suggest no reason why Congress would have intended to preclude constitutional or statutory challenges to programs set up by regulation, but to limit the discretionary function exception for the very reason that a constitutional or statutory challenge to a program is involved. See our main brief at 19-20. Plaintiffs' argument will permit suits now brought under the APA or for declaratory and injunctive relief to be brought under the FTCA. See our main brief at 26-27. Plaintiffs do not refute this in their briefs. The discretionary function exception accordingly clearly applies. 9/

Plaintiffs cite certain companion cases to the instant case, in which other district courts have ruled for the plaintiffs. A.Br. 12-13. In other CIA mail-opening cases, however, plaintiffs' arguments have been rejected. Murphy v. CIA, N.D. Iowa, No. C 76-12, decided May 28, 1976; Siebel v. United States, N.D. Calif., No. C-76-1737 SC, decided December 17, 1976; Hardy v. United States, D. D.C., No. 76-1423 (copies attached as an

9/ Plaintiffs seek to limit the discretionary function exception to cases where there is no "manageable judicial standard" to review the acts complained of. A.Br. 21-23. Plaintiffs cite Dalehite in this regard, but nothing in Dalehite supports this attempt to import justiciability issues into a discretionary function analysis. In fact, Dalehite makes clear that suits for negligence and other tortious acts may be encompassed by the discretionary function exception, and Dalehite itself involved allegations of negligence. 346 U.S. at 33, 38-39. There are obviously "manageable judicial standards" in negligence suits; the discretionary function exception may nonetheless apply.

addendum to this brief). In Siebel, Judge Contf, relying on Dalehite, held that under the Tort Claims Act

In determining whether the acts of a federal agency are discretionary, the distinction is traditionally made between acts which are "operational" in nature and those which occur at the planning or policy-making level of government. Courts have frequently held that while the "discretionary function" exception is not applicable to the performance of the details involved in executing a government program at the "operational level", it nevertheless protects the government from liability for an exercise of discretion at the level where policies are made, refined, and initiated. See, Dalehite v. United States supra, 346 U.S. at 35; Friday v. United States, 239 F.2d 701, 703 (9th Cir., 1957); Goodwill Industries of El Paso v. United States, 218 F.2d 270 (5th Cir., 1954).

* * * *

The mail intercept program, which is the subject of the action, has been described by the CIA's Chief of Counterintelligence as a "basic counterintelligence asset designed to give the United States intelligence agencies insight into Soviet intelligence activities and interests". (Defendant's Exhibit A, "Report to the President by the Commission on CIA Activities within the United States", p. 101). Investigation of Soviet intelligence activities and interests is a legitimate function of the CIA. There is no doubt that the mail intercept program at issue here was the result of acts which occurred at the planning or policy-making level of government by executives or administrators of the CIA in an attempt to effectuate a legitimate CIA purpose. As such, these acts are within the ambit of the "discretionary function" exception of the FTCA. Likewise, the actions of CIA subordinates who opened letters as a result of this program are not actionable under the FTCA.

Slip op. at 2-4; Addendum at 5a-7a.

2. The postal matter exception applies.

In arguing that the postal matter exception does not apply, plaintiffs rely primarily on the ipse dixit that there was no miscarriage of letters in this case. A.Br. 25; B.Br. 24-25. As demonstrated in our main brief at 29-30, the accepted meaning of the word "miscarriage" includes the activity out of which this lawsuit arose, and plaintiffs submit no contrary definitional authority. Plaintiffs also repeat the argument of the district court that the postal matter exception must be limited to cases where the risk could be covered by postal registration or insurance. A.Br. 24-25. But plaintiffs ignore the fact that acceptance of such a limitation would permit Tort Claims Act suits in situations clearly excluded by the postal matter exception, such as when mail is delayed. See our main brief at 30-31. No tenable argument has been put forward for why the postal matter exception should not apply in this case.

3. New York law provides no cause of action.

Plaintiffs make no attempt to respond to our demonstration that the district court erred in awarding damages based upon invasion of privacy and common law copyright under New York state law. B.Br. 3; A.Br. 27. Instead, plaintiffs rely upon (1) an asserted New York cause of action for violation of the constitution or state law and (2) upon the tort of trespass to chattels. B.Br. 3-21; A.Br. 27. Neither theory supports the awards made in this case.

A. Cause of action for illegal search and seizure.

Plaintiffs argue at length that the Fourth Amendment applies to New York. B.Br. 5-7. This is undoubtedly true, if not for the reasons stated by plaintiffs. See Mapp v. Ohio, 367 U.S. 6 (1961). In any event New York has similar limitations on searches and seizures. See B.Br. 12-13. But the presence of limitations is a far cry from the presence of a cause of action for damages for exceeding the limitations. Nothing in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), indicates that there would be a cause of action under state law for violations of the Fourth Amendment. ^{10/} And

^{10/} Plaintiffs cite New Jersey and Illinois as states whose courts have found state causes of action for Fourth Amendment violations. B.Br. 8. There is no requirement that they do so, however, as other state courts have recognized. See Gabaldon v. United Farm Workers Organizing Committee, 35 Cal.App.3d 757, 763, n. 4, 111 Cal. Rptr. 203, 206, n. 4 (1974), cert. denied, 416 U.S. 957; Larez v. Oberti, 23 Cal.App.3d 217, 223-25, 100 Cal. Rptr. 57, 60-61 (1972); cf. City of Boston v. Ditson, 348 N.E.2d 116, 122, n. 8 (App. Ct. Mass. 1976).

there is no support for plaintiffs' contention that New York courts would imply an additional cause of action for damages for violations of the Fourth Amendment (or of New York statutory limitations on searches). B.Br. 7-13, 18-21.

Cunliffe v. County of Monroe, 63 Misc. 2d 62, 312 N.Y.S. 2d 879 (Monroe Cy. 1970), relied upon by plaintiffs at B.Br. 8, involved uncompensated taking of land rather than violation of due process or search and seizure protections. 11/

Plaintiffs rely (B.Br. 8) on Nader v. General Motors Corp., 57 Misc. 2d 301, 292 N.Y.S.2d 514 (Sup. Ct. 1968), aff'd. on other grounds 31 A.D.2d 392, 298 N.Y.S.2d 137 (1st Dept. 1969), aff'd. 25 N.Y.2d 560, 307 N.Y.S.2d 647, 255 N.E.2d 765 (1970), despite the fact that the Appellate Division, in affirming on the basis of District of Columbia law, expressly indicated that there would be no cause of action under New York law. See our main brief at 38, n. 13.

11/ While the trial term in that case referred to Fifth Amendment law, the source of the cause of action for "unconstitutional taking" under New York law is the New York Constitution, Art. 1, §7. See Trippe v. Port of New York Authority, 17 A.D.2d 472, 236 N.Y.S.2d 312, 315 (2d Dept. 1962), rev'd 14 N.Y.2d 119, 249 N.Y.S.2d 409, 198 N.E.2d 585 (1964), relied upon in Cunliffe, 63 Misc. 2d at 64, 312 N.Y.S.2d at 883. In fact, the New York Court of Appeals in Trippe held, without any reference to Fifth Amendment law, that the New York constitutional provision for just compensation in taking cases did not waive sovereign immunity, and that a cause of action against a county for uncompensated taking was therefore limited by New York statutes. 14 N.Y.2d at 125, 249 N.Y.2d at 412, 198 N.E.2d at 587.

Plaintiffs also rely on the tort principle that a statutory duty sets forth a standard of care in negligence cases. B.Br. 9-10, 13. Plaintiffs did not allege negligence as a cause of action in their complaints (see App. 4, 16, 171), and the district court did not award damages on the basis of negligence. Issues which would be relevant in a negligence case, such as whether any statutory violation was excusable, were accordingly not raised or decided. Normally, in a negligence cause of action

all that is required is reasonable diligence to obey the statute, and it frequently has been recognized that a violation of the law is reasonable, and may be excused.

Prosser, Torts §36 at 198 (4th ed. 1971). ^{12/} If negligence has been the cause of action in this case, such an argument could have been made (see our main brief at 5-7), as well as others. ^{13/} But negligence was not the cause of action tried

^{12/} It is possible that a statute may impose a duty for whose violation there is no excuse, but such statutes are "the exception" and deal primarily with regulation of child labor or work safety. Prosser, Torts, §36 at 197-98 (4th ed. 1971); see 41 N.Y. Jur., Negligence §41 at 55 (1965). The cases cited by plaintiffs (B.Br. 9) are of this limited type.

^{13/} Plaintiffs' argument appears to require that every unlawful act, no matter how little the statute involved relates to a "standard of care" in the ordinary sense of the term, could result in a negligence suit. The use of statutes to establish standards of care has not, however, generally been extended to permit suits in negligence whenever, for instance, an administrative law judge misinterprets a statute. In such a case the appropriate cause of action is judicial review of agency action, not negligence. Similarly the instant case is one in the nature of invasion of privacy, and the presence of statutory issues does not render this a negligence case.

by the district court, and concepts peculiar to that cause of action are insufficient to imply a new cause of action for violation of constitutional rights.

As we demonstrated in our main brief, New York provides a cause of action in appropriate cases of Fourth Amendment violations, that is, when a recognized tort is involved (as one usually is). See our main brief at 37-38. In addition to those cases cited by plaintiff which expressly dealt with recognized torts (compare B.Br. 20-21 with our main brief at 37-38), plaintiffs cite two cases which also clearly involved recognized torts, but in which, because no search and seizure violation was found, the courts had no need to specify the particular cause of action. Hook v. State, 15 Misc. 2d 672, 181 N.Y.S.2d 621, 627-28 (Ct. Cl. 1958) (trespass); Brenon v. State, 31 A.D.2d 776 (case 2), 297 N.Y.S.2d 88 (4th Dept. 1969) (memorandum) (trespass and conversion). In a trespass or false imprisonment case the only relevant issue may be whether a Fourth Amendment violation occurred, but this does not change the nature of the tort from trespass or false imprisonment to "Fourth Amendment violation." The bottom line of plaintiffs' argument therefore is that if they are entitled to damages under New York law, it is not for a constitutional violation in itself, but only for trespass, invasion of privacy, or copyright infringement. B.Br. 21. Of the three, plaintiffs' brief deals only with trespass.

B. Trespass to chattels.

Plaintiffs are mistaken, however, in their contention (B.Br. 14-18) that the district court could properly have awarded damages in this case for trespass to chattels. Trespass to chattels is a tort for impairment of a plaintiff's possessory interest in chattel, and simply does not apply in this case. ^{14/} The district court did not even rely on that cause of action.

Some damage to a possessory interest is necessary in order for the cause of action to arise. Prosser, Torts, §14 at 77 (4th ed. 1971). Where, unlike in this case, the plaintiff is in physical possession of the chattel, any loss of possession constitutes sufficient damage to the possessory interest. Id. at 77-78; see also Restatement (Second) of Torts §218(a) (1965). This includes taking chattel into the custody of the law by attachment or otherwise, even when the goods are not touched. Prosser, supra, at 77-78 & n. 60; Restatement, supra, §221(e) & comment g; Wintringham v. Lafoy, 7 Cow. 735 (1837), relied upon by plaintiffs, B.Br. 14-15. In the instant case, however, the plaintiffs were not in possession of the letters at issue at the time of the asserted tortious conduct. See Restatement, supra, §216. ^{15/} At

^{14/} Damages for trespass to chattel are usually less than the full value of the chattel itself. Restatement (Second) of Torts §222A, comment c (1965).

^{15/} In contrast, in Wintringham, the case relied upon at length by plaintiff (B.Br. 14-15), it was not controverted that the goods were in the possession of the plaintiff Lafoy, once it was determined that Lafoy properly owned the store and that Gallis was merely acting as an agent for him. 7 Cow. at 736.

most they were only entitled to possession. There was, therefore, no dispossession, and some other damage to plaintiffs' possessory interest must be shown. Restatement, supra, §§219, 220. Damage to the chattel would be sufficient, but there is no evidence that the letters involved in this case were damaged, or their value diminished. Destruction of a plaintiff's ultimate legal right to possess the chattel also would be sufficient, but plaintiffs' letters were delivered intact. This is therefore simply not a case in which a concurrent or future possessory interest in chattel was in any way impaired. There is accordingly no cause of action for trespass to chattels in this case.

4. The District Court awarded excessive damages.

In their attempts to defend the district court's damage award, plaintiffs cite several cases in which more than \$1,000 was awarded. A.Br. 29-33. The cases involve injuries resulting from such acts as race discrimination or wrongfully informing a plaintiff that her mother had died. The emotional distress caused by such acts cannot reasonably be compared to that caused by one's finding out that a very limited number of people had read a letter sent or received several years before.

Plaintiffs accordingly rely, as did the district court, on the inherent value of the constitutional right involved. A.Br. 33-35; 436 F. Supp. at 987-88; App. 159-60. (The district court also charged the advisory jury that compensation

for the inherent value of constitutional rights was appropriate. Tr. 164-67.) The Supreme Court, however, has just reversed the only case cited by the district court in this regard. Piphus v. Carey, 545 F.2d 30 (C.A. 7, 1976), reversed, 46 U.S.L.W. 4224 (U.S., March 21, 1978). That suit was brought under 42 U.S.C. §1983 against school officials for violation of due process rights (suspending plaintiff students without a hearing). The Court rejected the Court of Appeals' theory of inherent value (see our main brief at 44) and held that in the absence of proof of actual injury, the plaintiffs were entitled to recover only nominal damages.

The Supreme Court stated:

Inssofar as petitioners contend that the basic purpose of a §1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights, they have the better of the argument. Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests, and their contours are shaped by the interests they protect.

Our legal system's concept of damages reflects this view of legal rights. "The cardinal principle of damages in Anglo-American law is that of compensation for the injury caused to plaintiff by defendant's breach of duty." 2 F. Harper & F. James, Law of Torts §25.1, p. 1299 (1956) (emphasis in original). The Court implicitly has recognized the applicability of this principle to actions under §1983 by stating that damages are available under that section for actions "found . . . to have been violative of . . . constitutional rights and to have caused compensable injury. . . ." [citations omitted, emphasis supplied by the Court]. The lower federal courts appear generally to agree that damages awards under §1983 should be determined by the compensation principle.

46 U.S.L.W. at 4226. In determining how to apply the compensatory principle to cases of due process violations, the Court addressed the Seventh Circuit's inherent value analysis:

Petitioners do not deny that a purpose of procedural due process is to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests. They go so far as to concede that, in a proper case, persons in [plaintiffs'] positions might well recover damages for mental and emotional distress caused by the denial of procedural due process. Petitioners' argument is the more limited one that such injury cannot be presumed to occur, and that plaintiffs at least should be put to their proof on the issue, as plaintiffs are in most tort actions.

We agree with petitioners in this respect.

46 U.S.L.W. at 4228.

The Court reasoned that unlike in the case of defamation per se, where the doctrine of presumed damages, "an oddity of tort law," prevails, not every departure from procedural due process is as likely to cause distress as the publication of defamation per se. The Court added:

we foresee no particular difficulty in producing evidence that mental and emotional distress actually was caused by the denial of procedural due process itself. Distress is a personal injury familiar to the law, customarily proved by showing the nature and circumstances of the wrong and its effect on the plaintiff.

46 U.S.L.W. at 4228. While the Court's analysis of whether presumed damages were permitted was limited to procedural due process violations, the same analysis would apply to Fourth Amendment violations. Not every illegal search or seizure is as likely to cause distress as the publication of defamation per se, and there is in general no difficulty in producing evidence that mental and emotional distress actually was caused by Fourth Amendment violations. Indeed, in dictum the Supreme Court found that cases dealing with the denial of Fourth Amendment rights either "held or implied that some actual, if intangible, injury must be proved before compensatory damages may be recovered" or "simply did not address the issue." 46 U.S.L.W. at 4228-29, & n. 22.

It therefore follows clearly from Carey that the district court erred in relying on the inherent value of plaintiffs' constitutional rights. While, in plaintiffs' words, "none of us would sell our birthright of freedom for \$1,000" (A.Br. 35), this does not mean that each Fourth Amendment violation results in \$1,000 in damages, any more than it meant in Carey that every due process violation results in more than nominal damages. If more than actual damages is awarded, the award is inherently punitive, ^{-6/} and is not permitted under the Federal Tort Claims Act. 28 U.S.C. §2674.

^{16/} Plaintiffs note that compensatory damages have a proper deterrent effect. A.Br. 35 n. 11. While this is true, any award which is based on the deterrent effect, in addition to compensation for actual damages, to the extent that it exceeds what would have been awarded as compensation for actual damages alone, is punitive to that extent. In other words, the district court could properly award compensation for actual damages; although such an award has an additional effect of deterrence, the district court may not properly take deterrence into account in determining the amount of actual damages. The district court in this case clearly did so.

RESPONSE TO PLAINTIFF'S CROSS-APPEAL

On his cross-appeal, plaintiff Birnbaum contends that the Seventh Amendment entitles him to a jury trial under the Federal Tort Claims Act, despite the specific statutory prohibition of 28 U.S.C. §2402. B.Br. 27-50. In the more than 30 years since the Federal Tort Claims Act was enacted no court has accepted this proposition.^{17/} This is because the United States may limit its waiver of sovereign immunity to suits without juries. The Supreme Court has made clear that such limitations do not conflict with the Seventh Amendment.

In McElrath v. United States, 102 U.S. 426 (1880), the plaintiff in a suit brought in the Court of Claims challenged the award of a counterclaim against him without a jury, as a violation of the Seventh Amendment. The Supreme Court unequivocally rejected the plaintiff's claim on the ground that suits against the United States are not "suits at common law within its true meaning":

There is nothing in these [statutory] provisions which violates either the letter or spirit of the Seventh Amendment. Suits against the government in the Court of Claims, whether reference be had to the claimant's demand, or to the defence, or to

^{17/} See Glasspool v. United States, 190 F. Supp. 804 (D. Del. 1961); 2 Jayson, Handling Federal Tort Claims §305.01 and cases cited at n. 16 (1978).

any set-off, or counter-claim which the government may assert, are not controlled by the Seventh Amendment. They are not suits at common law within its true meaning. The government cannot be sued, except with its own consent. It can declare in what court it may be sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States. Congress, by the act in question, informs the claimant that if he avails himself of the privilege of suing the government in the special court organized for that purpose, he may be met with a set-off, counter-claim, or other demand of the government, upon which judgment may go against him, without the intervention of a jury, if the court, upon the whole case, is of opinion that the government is entitled to such judgment. If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the government to the exercise of the privilege. Nothing more need be said on this subject.

102 U.S. at 440 (emphasis added). This holding was reaffirmed in dictum in United States v. Sherwood, 312 U.S. 584 (1941), (holding that in Tucker Act suits the United States had not consented to be sued jointly with private parties):

The Court of Claims is a legislative, not a constitutional, court. Its judicial power is derived not from the Judiciary Article of the Constitution, but from the Congressional power "to pay the debts...of the United States," which it is free to exercise through judicial as well as non-judicial agencies. See Williams v. United States,

289 U.S. 553, 569, 579; Ex parte Bakelite Corporation, 279 U.S. 438, 452, et seq. It is for this reason, and because of the power of the sovereign to attach conditions to its consent to be sued, that Congress despite the Seventh Amendment, may dispense with a jury trial in suits brought in the Court of Claims. McElrath v. United States, 102 U.S. 426; Williams v. United States, supra, 570, 571; Ex parte Bakelite Corporation, supra, 453.

312 U.S. at 584 (emphasis added). Plaintiff argues that these cases were based on the fact that the Court of Claims was deemed to be an Article I court, B.Br. 36-38, and that they are now supportable only because of the peculiar nature of the Court of Claims, B.Br. 38-40.

The finding that the Court of Claims was a legislative court was only an alternative basis for these statements, however, and "the power of the sovereign to attach conditions to its consent to be sued" constitutes an independent basis. See the above-quoted language in Sherwood. Thus in Galloway v. United States, 319 U.S. 372 (1943), a case involving suit against the United States in district court under a statute clearly providing for jury trials, the Supreme Court prefaced its discussion of the Seventh Amendment as follows:

It may be noted, first, that the Amendment has no application of its own force to this case. The suit is one to enforce a monetary

claim against the United States. It hardly can be maintained that under the common law in 1791 jury trial was a manner of right for persons asserting claims against the sovereign. 17/ Whatever force the Amendment has therefore is derived because Congress, in the legislations cited, has made it applicable.

17/ Neither the Amendment's terms nor its history suggest it was intended to extend to such claims. The Court of Claims has functioned for almost a century without affording jury trial in cases of this sort and without offending the requirements of the Amendment. McElrath v. United States, 102 U.S. 426; see Richardson, History, Jurisdiction and Practice in the Court of Claims (2nd ed., 1885).

319 U.S. at 388-89. More recently the Supreme Court has held that the Court of Claims is not an Article I court. Glidden Co. v. Zdanok, 370 U.S. 530 (1962). In doing so Mr. Justice Harlan, speaking for the plurality, reaffirmed McElrath and Sherwood solely on the ground that the Seventh Amendment does not apply to suits against the Government:

A preliminary consideration that need not detain us long is the absence of provision for jury trial of counterclaims by the Government in actions before the Court of Claims. Despite dictum to the contrary in United States v. Sherwood, 312 U.S. 584, 587, the legitimacy of that nonjury mode of trial does not depend upon the supposed "legislative" character of the court. It derives instead, as indeed was also noted in Sherwood, ibid., from the fact that suits against the Government, requiring as they do a legislative waiver of immunity, are not "suits at common law" within the meaning of the

Seventh Amendment. McElrath v. United States, 102 U.S. 426, 439-440. The Congress was not, therefore, required to provide jury trials for plaintiffs suing in the Court of Claims; the reasonableness of its later decision to obviate the need for multiple litigation precludes a finding that its imposition of amenability to nonjury set-offs was an unconstitutional condition. Cf. Minneapolis & St. L.R. Co. v. Bombolis, 241 U.S. 211; see 74 Harv. L. Rev. 414, 415 (1960).

370 U.S. at 572. Mr. Justice Clark and Chief Justice Warren in their concurring opinion did not quarrel with this analysis. 370 U.S. at 585-89.

Plaintiff argues that these clearly applicable precedents are somehow weakened by more recent Seventh Amendment cases. B.Br. 30-34, 36 n. 38. None of these cases involved suit against the United States, however, and they thus simply have no effect on the holding that the Seventh Amendment does not apply to suits against the United States.

Plaintiff argues that common law actions against the sovereign were well established in 1791 when the Seventh Amendment was passed. B.Br. 41-45. That suits against the sovereign were permitted regularly as a matter of grace does not in any way lessen the strength of the doctrine of sovereign immunity or the sovereign's ability to condition waiver.

Justice Harlan's opinion in Glidden Co. in fact demonstrates that the Supreme Court was well aware of the English petition procedures so heavily relied upon by plaintiff. 370 U.S. at 563. (Moreover, as plaintiff concedes (B.Br. 42 n. 28), the English petition of right was not applied to tort cases. See Feather v. Queen, 6 B & S. 257, 293-96, 122 Eng. Rep. 1191, 1204-5 (Q.B. 1865).

This Court has squarely ruled that a statutory prohibition of jury trials in district court suits brought against the United States does not violate the Seventh Amendment. Cargill, Inc. v. Commodity Credit Corp., 275 F.2d 745 (C.A. 2, 1960). In that case the district court had granted a jury trial on a counterclaim in a suit brought against the Commodity Credit Corporation, a government corporation, despite the fact that 15 U.S.C. §714b(c) of the corporation's Charter Act provided that "[a]ll suits against the Corporation shall be tried by the court without a jury." This Court held that the Act ruled out a jury trial on the counterclaim. Judge Friendly stated:

The question is solely one of statutory interpretation, not of constitutionality. McElrath v. United States, 1880, 102 U.S. 426, 440, 26 L.Ed. 189, established that suits against the government, "whether reference be had to the claimant's demand or to the defense, or to any set-off, or counterclaim which the government may assert, are not controlled by the Seventh Amendment"; and we do not understand appellee to claim there is

any constitutional barrier to Congress' conditioning its waiver of immunity as to Commodity, "an agency or instrumentality of the United States," on requiring both claim and counterclaim to be tried to a judge. In any event we find there is none.

275 F.2d at 748. This Court went on to note the similarity of the language to 28 U.S.C. §2402, and specifically rejected a suggestion that the Tort Claims Act permits jury trials even of counterclaims by the United States. 275 F.2d at 749.

The absence of jury trials in Federal Tort Claims Act suits has accordingly been consistently and universally accepted. See United States v. Neustadt, 366 U.S. 696, 701 n. 10 (1961); O'Connor v. United States, 269 F.2d 578, 585 (C.A. 2, 1959); Government Employees Insurance Co. v. United States, 349 F.2d 83 (C.A. 10, 1965), cert. denied 382 U.S. 1026 (1966); Bonn v. Puerto Rico International Airlines, Inc., 518 F.2d 89, 94-95 (C.A. 1, 1975).

CONCLUSION

For the foregoing reasons, and for those set forth in our main brief, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April, 1978,
I served the foregoing Reply Brief of the United States
Combined With the Brief of the United States as Cross-
Appellee upon opposing counsel by causing copies to be
mailed, postage prepaid, to:

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JOHN M. ROGERS
Attorney.

A D D E N D U M

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

NORMAN HARDY,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

CIVIL ACTION NO. 76-1423

FILED

FEB 14 1977

MEMORANDUM AND ORDER

JAMES F. DAVEY, CLERK

This is a suit under the Federal Torts Claim Act (28 U.S.C. §1346(6) and §2671, et seq.) to recover money damages in the amount of \$60,000 as compensation for alleged injuries inflicted by employees of the Central Intelligence Agency, who, during the course of a CIA mail-opening program conducted from 1953 to 1973, opened, read, copied and circulated pieces of Plaintiff's first-class mail. The matter is presently before the Court on Defendant's Motion to Dismiss pursuant to Rule 12 of the Federal Rules of Civil Procedure on the grounds that the Court lacks jurisdiction over the subject matter of the action and that the complaint fails to state a claim upon which relief can be granted.

Defendant claims that Plaintiff cannot obtain monetary damages from the United States under the Federal Tort Claims Act because the actions complained of are alleged to be illegal activities and hence not performed within the scope of any Government employee's office or employment, as required by the Act. Defendant further argues

that the actions here fall within specified exemptions to the Government's liability under the Act, saying that Plaintiff's petition for relief is barred by the "discretionary function" exemption of 28 U.S.C. §2680(a), the "postal matter" exemption of §2680(6), and the "intentional tort" exemption of §2680(h).

The Court does not reach the merits of each of Defendant's arguments. The Court is satisfied that the activities of the CIA at issue in this case are exempted under one or more of the exceptions enumerated in 28 U.S.C. §2680. It is the opinion of the Court that exemption (a) of §2680, excluding "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a Federal agency or employee of the Government, whether or not the discretion involved be abused," from liability under the statute^{1/} or exemption (b) of §2680, making "loss, miscarriage, or negligent transmission of letters or postal matter" unactionable under the terms of the Act^{2/} applies to the facts at hand. This Court is therefore in accord with the holding of the District Court for the Southern District of Iowa in Norman C. Murphy v. Central Intelligence Agency, Civil Action No. C76-12 (S.D. Iowa, decided May 28, 1976).

1/ See Dalehite v. U.S. 346 U.S. 15, 35 (1953); Monarch Insurance Co. v. District of Columbia, 353 F.Supp. 1249 1253-4, (D.D.C. 1973), aff'd, 497 F.2d 684, cert. denied, 419 U.S. 1021 (1974).

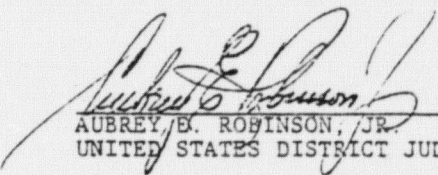
2/ See Goodman v. U.S., 324 F.Supp. 167, 171-2 (M.D. Fla. 1971), aff'd 455 F.2d 607 (5th Cir. 1971); Marine Insurance Co. v. U.S., 378 F.2d 812, 814 (2d Cir. 1967), cert. denied, 389 U.S. 953.

- 3 -

Accordingly, it is by the Court this 14th day of February, 1977,

ORDERED, that Defendant's Motion to Dismiss be and it is hereby GRANTED; and it is

FURTHER ORDERED, that the above-entitled action be and it is hereby DISMISSED.


AUBREY B. ROBINSON, JR.
UNITED STATES DISTRICT JUDGE

-3a-

ORIGINAL
FILED

DEC 11 1976

CLERK, U. S. DIST. COURT
SAN FRANCISCO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JULIA SIEBEL,)
Plaintiff,) No. C-76-1737 SC
-vs-)
UNITED STATES OF AMERICA,)
Defendant.)
ORDER

This is an action brought against the United States under the Federal Tort Claims Act (28 U.S.C. §1346(b) and 28 U.S.C. §2671, et seq.) (FTCA). Plaintiff seeks to recover damages for injuries caused by employees of the Central Intelligence Agency (CIA) who allegedly opened, read, copied and circulated three pieces of her first-class mail without a warrant or other legal justification. Plaintiff alleges that her mail was opened in New York pursuant to "a massive, covert, illegal and wrongful operation throughout the United States to intercept, open, read and photograph the contents of tens of thousands of sealed first class letters . . . " (Complaint, par.5.) This operation was given the code name HTLINGUAL and was conducted by the CIA from 1953 to 1973 (Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss, p.1, filed December 7, 1976).

The United States moves to dismiss this action for

1 the reason that the court lacks jurisdiction over the subject
2 matter or, in the alternative, that the complaint fails to
3 state a claim upon which relief can be granted.

4 The United States can not be sued unless Congress
5 has expressly waived sovereign immunity. United States v.
6 Sherwood, 312 U.S.585 (1941); United States v. Shaw, 304 U.S.
7 495 (1940). The FTCA effects a general waiver of sovereign
8 immunity as to claims against the United States for damages
9 arising from the negligent or wrongful acts or omissions of
10 its employees acting within the scope of their employment.
11 28 U.S.C. §1346(b). Congress has circumscribed this waiver
12 of sovereign immunity by creating certain categories of
13 exceptions. 28 U.S.C. §2680. These categories consist of
14 acts and omissions for which the United States may not be held
15 liable. One of these categories exempts the United States
16 from liability for claims "based upon the exercise or perform-
17 ance or the failure to exercise or perform a discretionary
18 function or duty on the part of a federal agency or an employee
19 of the Government, whether or not the discretion involved be
20 abused." 28 U.S.C. §2680(a). This exception is commonly
21 called the "discretionary function" exception, and it is to
22 be strictly construed in favor of the United States. See,
23 Dalehite v. United States, 346 U.S.15, 31 (1953).

24 In determining whether the acts of a federal
25 agency are discretionary, the distinction is traditionally
26 made between acts which are "operational" in nature and those
27 which occur at the planning or policy-making level of govern-
28 ment. Courts have frequently held that while the "discretion-
29 ary function" exception is not applicable to the performance
30 of the details involved in executing a government program at
31 the "operational level", it nevertheless protects the govern-
32 ment from liability for an exercise of discretion at the level

1 where policies are made, refined, and initiated. See,
2 Dalehite v. United States, supra, 346 U.S. at 35; Friday v.
3 United States, 239 F.2d 701, 703 (9th Cir.1957); Goodwill
4 Industries of El Paso v. United States, 218 F.2d 270 (5th
5 Cir. 1954).

6 The Supreme Court has held that the "discretionary
7 function" exception covers more than the mere initiation of
8 government programs and activities. It also includes determin-
9 ations made by executives or administrators in establishing
10 plans, specifications, or schedules of operations. In this
11 regard, the Supreme Court also held that the actions of sub-
12 ordinates in carrying out the operations of government in
13 accordance with official directions cannot be actionable under
14 the FTCA. Dalehite v. United States, supra, 346 U.S. at 35.

15 The enabling legislation creating the CIA and
16 prescribing its functions, powers, and duties, vests the
17 Agency with broad discretion in carrying out its responsibility
18 to coordinate the intelligence activities of the United States.
19 See, 50 U.S.C. §403. Among the Agency's prescribed duties is
20 the duty "to correlate and evaluate intelligence relating to
21 the national security." 50 U.S.C. §403(d)(3). Further, the
22 Agency has the duty "to perform such other functions and
23 duties related to intelligence affecting the national security
24 as the National Security Council may from time to time direct."
25 50 U.S.C. §403(d)(5).

26 The mail intercept program, which is the subject
27 of the action, has been described by the CIA's Chief of
28 Counterintelligence as a "basic counterintelligence asset
29 designed to give the United States intelligence agencies
30 insight into Soviet intelligence activities and interests".
31 (Defendant's Exhibit A, "Report to the President by the
32 Commission on CIA Activities within the United States", p.101).

Investigation of Soviet intelligence activities and interests is a legitimate function of the CIA. There is no doubt that the mail intercept program at issue here was the result of acts which occurred at the planning or policy-making level of government by executives or administrators of the CIA in an attempt to effectuate a legitimate CIA purpose. As such, these acts are within the ambit of the "discretionary function" exception of the FTCA. Likewise, the actions of CIA subordinates who opened letters as a result of this program are not actionable under the FTCA.

The court notes that the mail intercept activity complained of here might very well be unlawful if conducted by private persons. See, 18 U.S.C. §§1701-03. However, this in itself does not subject the United States to civil liability. The FTCA exempts the United States from liability for discretionary acts performed by its employees, whether or not the discretion involved be abused. The discretionary acts complained of here might have involved an abuse of discretion. Nevertheless, the United States has not waived its sovereign immunity with respect to these acts. In light of this, the court concludes that it lacks subject matter jurisdiction over this controversy. Accordingly, the action must be dismissed.

In accordance with the foregoing, defendant's motion to dismiss for lack of subject matter jurisdiction is granted, and it is ordered that this action be dismissed.

Dated: December 17, 1976.

SAMUEL COURT
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF IOWA

CIVIL ACTION FILE NO. C 76-12

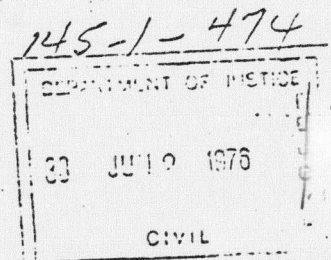
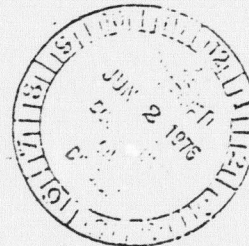
NORMAN C. MURPHY,
vs.
THE CENTRAL INTELLIGENCE AGENCY.

JUDGMENT

This action came on for ~~trial~~ (hearing) before the Court, Honorable Edward J. McManus,
United States District Judge, presiding, and the issues having been duly ~~made~~
(heard) and a decision having been duly rendered,

It is Ordered and Adjudged

That the plaintiff take nothing and that the action be dismissed on
the merits.



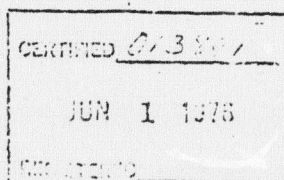
CIVIL DIV.
SPECIAL LITIGATION SECTION

FILED
CEDAR RAPIDS HQTRD. OFFICE
NORTHERN DISTRICT OF IOWA

MAY 23 1976

K. W. FUELLING, CLERK
DEPUTY

Dated at Cedar Rapids, Iowa, this 29th day
of May, 1976.



K. W. FUELLING, CLERK

By *[Signature]*
Chief Deputy Clerk of Court

Appendix B

-8a-

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

NORMAN C. MURPHY,
Plaintiff,
vs.
THE CENTRAL INTELLIGENCE
AGENCY,
Defendant.

No. C 76-12

ORDER

FILED
CEDAR RAPIDS DISTRICT OFFICE
NORTHERN DISTRICT OF IOWA

MAY 28 1976
10:30 AM
K. W. JUELING, Clerk
By: C. B. [Signature]
Deputy

This matter is before the court on defendant's unresisted motion to dismiss, filed May 13, 1976.

Plaintiff instituted this pro se action against the Central Intelligence Agency (CIA) to recover \$1,000,000.00 in damages for alleged violations of constitutional rights. Specifically, plaintiff avers that defendant unlawfully opened and inspected his mail, thereby infringing his constitutional rights to privacy, to be free of unreasonable searches and seizures, and other "civil liberties."

Defendant CIA moves to dismiss under Rule 12(b)(1), FRCP, on the ground that the court lacks subject matter jurisdiction. The motion appears well taken.

Initially, the court notes that plaintiff has failed to set forth in the complaint a statement of the grounds on which the court's jurisdiction depends as required by Rule 8(a)(1), FRCP. Aside from the technical pleading deficiency, the court is unable to discern a basis for jurisdiction from the factual allegations pleaded.

It is axiomatic that the United States cannot be sued unless Congress has expressly waived sovereign immunity. United States v. Sherwood, 312 U.S. 584, 61 S.Ct. 767, 85 L. Ed. 1058 (1941); United States v. Shaw, 309 U.S. 425, 60 S.Ct. 659, 84 L.Ed. 888 (1940); North Dakota-Montana Wheat Growers Ass'n v. United States, 66 F.2d 573 (8th Cir. 1933), cert. denied, 291 U.S. 672. Clearly this action which seeks money damages from an executive agency and, if successful, would

expend itself on the public treasury, is a suit against the United States. See Dugan v. Park, 372 U.S. 609, 620, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963); Land v. Dollar, 330 U.S. 731, 730, 67 S.Ct. 1000, 91 L.Ed. 1209 (1947); Grotta v. United States, 415 F.2d 1271, 1277 (8th Cir. 1969) (Blackmun, J.), cert. denied, 397 U.S. 394.

Here plaintiff's complaint can be construed either as alleging a claim in tort or squarely upon the constitutional provisions which protect the rights allegedly infringed. Neither theory affords a basis, on the facts alleged in the instant case, for an express waiver of sovereign immunity.

Congress has waived sovereign immunity for various tort actions in the Federal Tort Claims Act (FTCA), 28 USC §51346 (b), 2671 et seq. But it is incumbent upon a claimant to bring his cause of action within the jurisdictional limits circumscribed by the FTCA. Konecny v. United States, 386 F.2d 59, 62 (8th Cir. 1967). The exceptions listed in 28 USC §2680 thus relate to subject matter jurisdiction, Gibson v. United States, 457 F.2d 1391, 1392 n. 1 (3rd Cir. 1972); Konecny, supra at 62, and it appears that one or more of these exceptions apply to the facts alleged.

Insofar as the complaint alleges that the initiation and scheduling of operations for an alleged program to open mail was tortious, the exemption from the FTCA for discretionary functions, 28 USC §2680(a), would seem to apply. See Dalehite v. United States, 346 U.S. 15, 34-36, 73 S.Ct. 956, 97 L.Ed. 1427 (1953). The acts alleged also appear to be exempted in whole or part from coverage under the FTCA as either intentional torts, 28 USC §2680(h), see Monarch Ins. Co. v. District of Columbia, 353 F.Supp. 1249, 1253, 1254 (D. D.C. 1973); Bell v. Hood, 71 F.Supp. 913, 817 (S.D.Cal. 1947) (On remand), or as arising from the "loss, miscarriage or negligent transmission of letters or postal matter." 28 USC §2680(b); see Marine Insurance Co. v. United States, 378 F.2d 912 (2nd Cir. 1967), cert. denied, 389 U.S. 953.

Furthermore, plaintiff has failed to show the filing of a claim with the agency itself as mandated by 28 USC §2675. This administrative claim procedure is a jurisdictional prerequisite to suit in this court. Melo v. United States, 505 F.2d 1026 (8th Cir. 1974); De Groot v. United States, 384 F. Supp. 1178 (N.D. Ia. 1974).

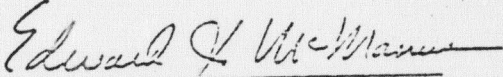
Plaintiff's second conceivable theory for recovery is an action premised on the holding in Bivens v. Six Unknown Named Agents, 403 U.S. 383, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), that a cause of action for damages may be pursued against federal officials for unconstitutional acts. The case at bar is not against individual CIA officials, but rather against the agency itself, and hence against the United States as indicated above. Congress has not expressly waived sovereign immunity for such an action.^{1/} Duarte v. United States, No. 75-6101 (2nd Cir. March 26, 1976); Monarch Ins. Co., supra at 1255; see United States v. Testan, 44 U.S.L.W. 4245 (U.S. March 2, 1976).

It is therefore

ORDERED

Dismissed.

May 28, 1976.


Edward J. McManus, Chief Judge
UNITED STATES DISTRICT COURT

1/

Even if the facts alleged were sufficient to plead a claim under Bivens, jurisdiction for such a claim in excess of \$10,000 would lie only in the Court of Claims. 28 USC §1346(a)(2); 1491.